test had not explained in detail why the amendment was material. In contrast, the GSA report contained detailed legal and factual support for GSA's conclusion that Chemray's bid was properly rejected as nonresponsive. In addition, the report alleged a procedural deficiency for which the protest could be dismissed. Thus, Chemray's response to GSA's decision clearly does not take issue with GSA's position set forth in the report, and cannot be considered comments on the agency report.

Because of this, and our notice to Chemray as to the consequences of its failure to respond in some manner to the GSA report—for example, by advising us to consider its comments on the GSA decision as its comments on the GSA protest report—the prior dismissal is affirmed.

[B-220522]

Vacancies—Vacancies Act—Applicability

Provisions of the Vacancies Act, 5 U.S.C. 3345–49 (1982), govern the filling of vacancies in those offices which require Senate confirmation in the Department of Health and Human Services, except where there is specific statutory authority to fill such vacancies. The Vacancies Act applies to the position of Under Secretary, and various Assistant Secretary positions, and the positions of Deputy Inspector General, Commissioner on Aging, Administrator of the Health Care Financing Administration, and Commissioner of Social Security. The Vacancies Act limits acting appointments to fill such positions to 30-days duration.

Appointments—Presidential—"Vacancies Act" Restrictions

Actions by individuals occupying offices pursuant to the Vacancies Act which are taken subsequent to expiration of 30-day time limitation set forth in 5 U.S.C. 3348 are of uncertain validity. Accordingly, at the end of the 30-day period, such individuals should refrain from taking any further action in an acting capacity.

To the Honorable William Proxmire, United States Senate, June 9, 1986:

This is in partial response to your letter dated September 25, 1985, in which you asked, among other things, to what extent the Vacancies Act applies to various officers of the Department of Health and Human Services serving in an acting capacity without Senate confirmation. As shown below, we conclude that the Vacancies Act is applicable to all of the positions in question and that those officers who serve more than 30 days in an acting status in such positions are in violation of the Act.

BACKGROUND

The following persons continue to serve in an acting status in positions that require confirmation by the Senate:

Interim Appointee	Position	Effective Date of Acting Status
Don M. Newman	Acting Under Secretary	12/16/85
Lawrence J. DeNardis	Acting Assistant Secretary for Legislation.	1/29/85
Robert B. Helms	Acting Assistant Secretary for Planning and Evaluation.	4/23/84
Carol Fraser Fisk	Acting Commissioner on Aging.	12/18/84
Henry R. Desmarais,[1] M.D.	Acting Administrator, Health Care Financing Administration.	2/02/86
Donald I. Macdonald, M.D.	Acting Assistant Secretary for Health.	12/02/85
Martha A. McSteen	Acting Commissioner of Social Security.	9/14/83

The following information has been provided our Office by the Department of Health and Human Services concerning the officers presently serving in acting capacities. All of the persons named above were appointed by the Secretary to serve in their present "acting" capacities.

Mr. Newman, the Acting Under Secretary, was nominated by the President to serve as Under Secretary on February 12, 1986. Additionally, Assistant Secretary for Human Development Services Dorcas R. Hardy has been nominated by the President to serve as Commissioner of Social Security and William R. Roper has been nominated to serve as Administrator, Health Care Financing Administration. We understand that the Senate Finance Committee has conducted hearings on these nominations.

No other nominations have been made for the above positions. With the exception of Dr. Donald I. Macdonald, who was confirmed as the Administrator of the Alcohol, Drug Abuse, and Mental Health Administration, none of the above named individuals has ever been confirmed by the Senate in any capacity. In addition, the Department has informed our Office that the position of Deputy Inspector General has remained vacant since January 22, 1981.

The positions of Under Secretary and two Assistant Secretaries were established by section 2 of the Reorganization Plan No. 1 of

[1] C. McClain Haddow served as Acting Administrator of the Health Care Financing Administration from August 12, 1985, to February 2, 1986, before the designation of Dr. Desmarais.

1953, effective April 11, 1953, 67 Stat. 631, 42 U.S.C. § 3501 note (1982). This section provides:

> There shall be in the Department an Under Secretary of Health, Education, and Welfare and two Assistant, Secretaries of Health, Education, and Welfare, each of whom shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Secretary may prescribe, and shall receive compensation at the rate now or hereafter provided by law for under secretaries and assistant secretaries, respectively, of executive departments. The Under Secretary (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.

The position of Commissioner of Social Security was established pursuant to section 4 of Reorganization Plan No. 1 of 1953, *supra,* which provides as follows:

> There shall be in the Department a Commissioner of Social Security who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions concerning social security and public welfare as the Secretary may prescribe, and shall receive compensation at the rate now or hereafter fixed by law for grade GS-18 of the general schedule * * *.

The other positions referred to above were established later. They all require appointment by the President and confirmation by the Senate, and the Congress has made no special provision for filling a vacancy in any of them.[2]

Appointment of Officers of the United States

The Appointments Clause of the Constitution, Article II, section 2, clause 2, provides as follows with regard to the appointments of offices:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Thus, the Constitution provides that officers of the United States must be appointed with the advice and consent of the Senate, except when the Congress clearly vests the full appointment power for a particular position or class of positions by law "in the President alone, in the Courts of Law, or in the Heads of Departments." See *Scully* v. *United States,* 193 F. 185, 187 (C.C.D. Nev. 1910).

[2] Under section 4(a) of Pub. L. 89-115, 79 Stat. 449 (1965), 42 U.S.C. § 3501a (1982), Congress provided for three additional Assistant Secretaries. The position of Commissioner on Aging was established by section 201 of title II, Pub. L. 89-73 (1965), 42 U.S.C. § 3011 (1982). The position of Administrator of the Health Care Financing Administration was made subject to Senate confirmation by section 2332(a) of Pub. L. 98-369 (1984), 98 Stat. 1089, to be codified at 42 U.S.C. § 1317. The position of Deputy Inspector General was established by section 202, title II, of Pub. L. 94-505 (1976), 42 U.S.C. § 3522(b) (1982).

The Vacancies Act

The so-called Vacancies Act, 5 U.S.C. §§ 3345-3349 (1982), provides methods for the temporary filling of vacancies created by the death, resignation, sickness or absence of the head of an Executive department or military department or the head of a bureau thereof whose appointment is not vested in the head of the department or in the President alone. Section 3345 provides that when the head of an Executive department or military department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347, his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3346 provides that when an officer of a bureau of an Executive department or military department whose appointment is not vested in the head of the department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347, his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

Section 3347 provides that, instead of a detail under section 3345 or 3346, the President may direct the head or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3349 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, except in the case of a vacancy occurring during a recess of the Senate.

Section 3348 of title 5, United States Code, provides that a vacancy caused by death or resignation may be filled temporarily under sections 3345, 3346, and 3347 for not more then 30 days.

The current provisions of the Vacancies Act are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168. The time limit now set forth in section 3348 was originally 10 days and was increased to 30 days by the Act of February 6, 1891, ch. 113, 26 Stat. 733.

Department of Health and Human Services Position

The Department of Health and Human Services does not view the Vacancies Act as being applicable to any of the appointments enumerated and discussed above. The Department's position is that each of the temporary appointments discussed above was made by the Secretary pursuant to section 6 of Reorganization Plan No. 1 of 1953, *supra,* which provides as follows:

> The Secretary may from time to time make such provisions as the Secretary deems appropriate authorizing the performance of any of the functions of the Secretary by any other officer, or by any agency or employee, of the Department.

Although recognizing that the vacancies discussed above are subject to the Appointments Clause of the Constitution, it is the De-

partment's position that the authority granted by section 6 of Reorganization Plan No. 1 of 1953, set forth above, allows for the Secretary's actions in one of two ways as explained below:

> First, the Secretary has promulgated a series of organizational plans and position descriptions that normally provide that if a vacancy occurs, the officer's first assistant (or other designated deputy) will act for the principal until the vacancy is filled. Here * * * six of the eight *ad interim* appointees are currently so-called first assistants (e.g., Deputy Commissioner, Social Security Administration) and assumed their *ad interim* status by virtue of the Department's organizational plan, authority vested in such deputies by virtue of those deputies position descriptions, or designation from among multiple deputies. Second, in certain instances where it was not feasible for the first assistant to assume the duties of the officer, the Secretary has made a special delegation of authority to a particular individual to carry out the functions of the vacant office. * * * [T]his method was used in two instances: Acting Assistant Secretary for Health and Acting Commissioner on Aging. In both cases, the *ad interim* appointee had occupied a significant position within the programmatic unit prior to the *ad interim* appointment.[3]

Additionally, it is HHS's position that the 30-day limitation on tenure of temporary appointees found in 5 U.S.C. § 3348 is not applicable to any of the vacancies discussed above for the following reasons:

> * * * First, the proscriptive provisions of the [Vacancies] Act do not restrict the authority of the Secretary to make *ad interim* designations where, as here, the Secretary is vested with independent statutory authority [section 6, Reorganization Plan No. 1 of 1953] to fill vacancies on an *ad interim* basis. Second, the Vacancies Act restrictions do not apply where, as here, each of the vacancies in question occurred during a Senate recess. Finally, since the 30-day restriction on interim appointments was not intended to apply to first assistants, even if the Act were applicable it should not be read as precluding the continued orderly functioning of the Department.

OPINION

The congressional intent in passing the 1868 act is indicated by debate recorded in the Congressional Globe of February 14, 1868:

> Mr. Trumbull. *The intention of the bill was to limit the time within which the President might supply a vacancy temporarily in the case of the death or resignation of the head of any of the Departments or of any officer appointed by him by and with the advice and consent of the Senate in any of the Departments.* As the law now stands, he is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the committee to an unreasonable length of time, and hence they have limited it by this bill to thirty days," [Changed by floor amendment to 10 days.] 39 Congressional Globe 1163, February 14, 1868 [Italic supplied.]

It has long been held by the Attorney General that after a vacant position has been temporarily filled under the Vacancies Act the power conferred by the Act is exhausted and the President does not have the authority to appoint either the same or another officer to temporarily fill the Office for an additional period. 16 Op. Atty. Gen. 596 (1880); 18 Op. Atty. Gen. 50 (1884); *Id.* at 58; 20 Op. Atty. Gen. 8 (1891).

[3] The Department's position, as described here and elsewhere in this letter, was provided in a memorandum dated November 27, 1985, Mr. Robert E. Robertson, the Department's General Counsel.

As the intent of the Vacancies Act is to preclude unreasonable delays in submitting nominations for offices subject to Senate confirmation, we have adopted the view that the 30-day limitation contained in 5 U.S.C. § 3348 runs only during the period that there is no name before the Senate for confirmation by the body. See 56 Comp. Gen. 761 (1977). Also see *Williams* v. *Phillips,* 482 F. 2d 669 (D.C. Cir. 1973). But see *United States* v. *Lucido,* 373 F. Supp. 1142 (E.D. Michigan, 1974), wherein the court in effect stated that, notwithstanding that a name has been submitted to the Senate for confirmation, an appointment under the Vacancies Act would terminate at the end of the 30-day period set forth in 5 U.S.C. § 3348. Accord, 32 Op. Atty. Gen. 139 (1920).

The 30-day limitation placed on temporary appointments by 5 U.S.C. § 3348 applies by its express terms only to appointments or designations made under the Vacancies Act. Accordingly, the limitation contained in section 3348 is not applicable where vacancies are filled pursuant to authority other than the Vacancies Act.

By its express terms the Vacancies Act is applicable to the Executive departments and military departments. Section 101 of title 5, United States Code (1982), sets forth the Executive departments. The Executive departments include the Department of Health and Human Services, of which the Administration on Aging, the Health Care Financing Administration, and the Social Security Administration are a part.

The positions filled by the seven acting officials under consideration here all require appointment by the President by and with the advice and consent of the Senate, and are, in our opinion, subject to the Vacancies Act. With the exception of Mr. Newman, none of the seven officials has been nominated for the position in which they are serving. Thus, the 30-day limitation set forth in 5 U.S.C. § 3348 is applicable to all such appointments except Mr. Newman's.

In addition, we note that, from the list furnished us by the Department of the persons acting in the various positions, several were apparently neither "the first assistant" to the office in which they are acting nor are they officers whose regular appointments were made by the President "by and with the advice and consent of the Senate," as is required by the Vacancies Act. 5 U.S.C. §§ 3346, 3347. Therefore, it does not appear that they were eligible for appointment to the acting positions under the Vacancies Act.

The Department, however, argues that section 6 of the Reorganization Plan provides the necessary authority for these temporary appointments, thereby making the Vacancies Act inapplicable. Under section 6, Reorganization Plan No. 1 of 1953, the Secretary of Health and Human Services may authorize any other officer or employee of the Department of Health and Human Services to perform any function of the Secretary.

The provisions of section 6 of the Reorganization Plan are virtually the same as those contained in 28 U.S.C. § 510 under which the

Attorney General may authorize any other officer or employee of the Department of Justice to perform any function of the Attorney General. In our decision B-150136, February 19, 1976, we held that 28 U.S.C. § 510 does not supersede the provisions of the Vacancies Act. As discussed below, we believe that the same conclusion should pertain with regard to section 6 of the Reorganization Plan No. 1 of 1953.

It is clear that the primary intent of Reorganization Plan No. 1 of 1953 was to establish the Department of Health, Education, and Welfare (now Health and Human Services); to provide clear and direct lines of authority and responsibility for the management of the Department; and to make the Secretary clearly responsible for the effectiveness and economy of administration of the Department. The wording in Reorganization Plan No. 1 is similar to the wording of other reorganization plans approved in that time period. In fact, nearly all executive agencies were reorganized under similarly worded reorganization plans to effectuate the recommendations of the Hoover Commission by establishing clear and direct lines of authority within each agency. See B-150136, February 22, 1973. Therefore, the position of the Department of Health and Human Services based on section 6 of Reorganization Plan No. 1 would, in effect, virtually nullify the statutory provisions contained in sections 3345-49 of title 5, United States Code. It is clear that such result was not intended.

The Department argues that the proscriptive provisions of the Vacancies Act, including the 30-day limitation imposed by 5 U.S.C. § 3348, do not apply where the vacancies in question arose while the Senate was in recess. As indicated above, section 3349 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, "except to fill a vacancy occurring during a recess of the Senate." What the quoted language in section 3349 recognizes is that the Vacancies Act is not the exclusive authority given to the President to make temporary appointments necessary "to fill a vacancy occurring during a recess of the Senate," thereby acknowledging the President's recess appointment authority found in Article II, section 2, clause 3 of the Constitution as follows: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Clearly, when the President elects to exercise his constitutional authority to make appointments during a recess of the Senate, the 30-day limitation found in the Vacancies Act does not apply. Instead, such an appointee would be eligible to serve until the end of the Senate's next session.

This is clearly not the case with the Department's interim appointments, however, as none was made by the President. We do not agree with the Department's broad reading of section 3349 as enabling the Secretary of Health and Human Services to fill all vacancies occurring during a recess of the Senate without time limitation. We believe that section 3349 provides a limited exception for only temporary appointments made by the President.

The Department also argues that the legislative history of the Vacancies Act can be read to support the notion that the time limitation in the Vacancies Act "originally was not intended to apply to vacancies filled in the natural course by the first assistants." The Department suggests that the compilers of the "Revised Statutes," acting pursuant to authority found in 19 Stat. 268 (1877), "erroneously broadened the limitation to encompass all temporary office holders, even the first assistants." However, as the Department acknowledged in its report to our Office, the Revised Statutes, being an Act of Congress, had the full force and effect of law. The Department also recognizes that the Congress has enacted subsequent amendments to the Vacancies Act and has enacted numerous recodifications of the United States Code without changing the Vacancies Act from its current form. Therefore, we conclude that the present wording of the Act represents the intent of the Congress on this matter and, in any event, is legally effective.

Finally, we note that some of the enumerated positions have been without a nominee for two years and longer. This appears to be precisely the sort of "unreasonable" delay the Vacancies Act was enacted to prevent. In the absence of any other statutory authority to fill the positions on a temporary basis outside the Vacancies Act, we conclude that the 30-day limit is applicable.

Effect of Vacancies on Actions Taken by Temporary Appointees

The legal status of actions taken by temporary appointees under the Vacancies Act who continue to serve in an acting capacity beyond the 30-day time limitation is uncertain.

Those actions may possibly be viewed as acts performed by a *de facto* officer. A *de facto* officer or employee is one who performs the duties of an office or position with apparent right and under color of appointment and claim to title of such office or position. *William A. Keel, Jr.,* B-188424, March 22, 1977, and decisions cited. In general we have held that acts performed while a person is serving in a *de facto* status are valid and effectual insofar as concerns the public and the rights of third persons. 42 Comp. Gen. 495 (1963); see also 63 Am. Jur.2d Public Officers and Employees § 518.

With regard to defective or invalid appointments, the general rule is stated in 63 Am. Jur.2d Public Officers and Employees § 504 (1972) as follows:

> • • • the general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner.

It is not clear, however, whether the Courts would apply the *de facto* doctrine where a statute specifically precluded the continued occupancy of the position. In 32 Op. Atty. Gen. 139 (1920), the Attorney General advised the Undersecretary of State, who inquired as to what action he and the officers of the Department of State should take upon the end of his 30-day period of service as Acting Secretary of State pursuant to the Vacancies Act:

> It is probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts.

In 56 Comp. Gen. 761 (1977), we considered the effect of actions taken by the Acting Insurance Administrator, Department of Housing and Urban Development, who had continued to serve beyond the 30-day time limitation set forth at 5 U.S.C. § 3348. We stated that when it is too late to offer the advice set forth by the Attorney General in 32 Op. Atty. Gen. 139, the secretary of the department should consider ratification of those actions and decisions already taken which she agreed with to avoid any further confusion as to their binding effect.

Ongoing Enforcement Problem Under the Vacancies Act

Since your original request of June 21, 1972, to our Office concerning the applicability of 5 U.S.C. § 3348 to the temporary appointment of Mr. L. Patrick Gray III as Acting Director of the Federal Bureau of Investigation, we have been called upon by members of the Congress to issue many decisions concerning other officials in the various Executive Branch departments and agencies. Although our decision holding that Mr. Gray's continued services as Acting Director was prohibited by law [4] resulted in the President's contemporaneous action in nominating Mr. Gray to be the permanent Director, our more recent decisions finding various Executive Branch officers serving in violation of the Vacancies Act have had less than the desired salutory effect. In fact, there now seems to be a discernible pattern for Executive Branch agencies to take exception to our decisions on Vacancies Act questions and, supported by the Department of Justice, to ignore the holdings of these decisions. Our interpretation of the Act has consistently recognized that its application can only be superseded in the case of statutes that provide specifically for an alternate means of filing a particular office. The Executive agencies take the view that the Act can be overcome by the general authority of a cabinet secretary to assign functions and delegate authority within a department.

You have also asked what enforcement authority exists in the Vacancies Act itself and what is the most appropriate remedy for appointments in violation of the Act. The Vacancies Act does not contain any specific enforcement authority or remedy for violations. In other situations we have recognized that we have the authority to disallow salary payments from appropriated funds for purposes that are contrary to law. See 53 Comp. Gen. 600 (1974). However, the "acting" official in Vacancies Act cases is usually one who is otherwise entitled to the salary of his or her permanent position. Hence, we have not to date exercised this authority in such cases.

We trust that the above information serves the purpose of your inquiry concerning the applicability of the Vacancies Act to the enumerated positions within the Department of Health and Human Services. The other issues raised in your September 25 letter will be answered in a separate report.

[4] B-150136, February 22, 1973.

[B-221585]

Appropriations—Augmentation—Details—Improper

Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment the appropriation of the receiving agency. 64 Comp. Gen. 370 (1985) *affirmed.*

Detail—Between Agencies—Non-Reimbursable Details

Proposed detail of 15 of 20 administrative law judges (ALJs) from the National Labor Relations Board (Board) to the Department of Labor on a nonreimbursable basis for the remainder of fiscal year 1986 does not conform to either of the exceptions in 64 Comp. Gen. 370 (1985) in which we generally found nonreimbursable details to be improper. The exception where the detail has a negligible fiscal impact is a *de minimus* exception for administrative convenience where the detail is for a brief period and the number of persons and costs involved are minimal. The detail of 15 to 20 ALJs and the related amount of salary expenses far exceeds the *de minimus* standard we intended to establish. Furthermore, the detail is not particularly related to the purpose for which the Board's appropriations are provided. Thus the proposed nonreimbursable detail does not fall within the other exception set forth in 64 Comp. Gen. 370.

Matter of: Nonreimbursable Transfer of Administrative Law Judges, June 9, 1986:

The Department of Labor asks whether it may utilize on a nonreimbursable basis the equivalent of 10 judge years from the administrative law judge corps of the National Labor Relations Board (Board) during the remainder of fiscal year 1986. At this point in fiscal year 1986, the Department's request for the equivalent of 10 judge years means 15 to 20 judges. For the reasons given below, we find that the proposed transfer of administrative law judges (ALJs) is improper.

The Department informs us that it needs additional ALJs to assist in adjudicating a backlog of some 20,000 black lung cases,[1]

[1] The number of black lung cases appealed to the Department's ALJ corps increased from 484 at the end of fiscal year 1979 to 20,450 at the end of fiscal year